



Pennsylvania Department of Environmental Protection

2 East Main Street  
Norristown, PA 19401

January 22, 2007

Southeast Regional Counsel

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Jonathan Spergel, Esquire  
Manko, Gold, Katcher & Fox, LLP  
401 City Avenue, Suite 500  
Bala Cynwyd, PA 19004

**RE: Bishop Tube HSCA Site**  
**First Amendment to Consent Order and Agreement**

Dear Jonathan:

Enclosed please find one (1) fully executed original of the First Amendment to Consent Order and Agreement for the Bishop Tube HSCA Site. Thank you for all your time and effort in resolving this matter. Please contact me if you have any additional questions or concerns.

Sincerely,

Lauren G. Rosen  
Assistant Counsel

Enclosure

Cc: D. Armstrong, ECP w/out enclosure  
A. Hartzell, OCC w/out enclosure



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Bishop Tube Site	:	Amendment to
East Whiteland Township	:	Prospective Purchase Agreement
Chester County, Pennsylvania	:	
Constitution Drive Partners, L.P.	:	
2701 Renaissance Boulevard, 4 <sup>th</sup> Floor	:	
King of Prussia, PA 19406	:	

**FIRST AMENDMENT TO  
CONSENT ORDER AND AGREEMENT**

This First Amendment to Consent Order and Agreement ("Amendment") is entered into this 22<sup>nd</sup> day of January, 2007, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), and Constitution Drive Partners, L.P. ("Developer," and Developer and the Department shall collectively be referred to herein as the "Parties").

WHEREAS, Developer and the Department entered into a Consent Order and Agreement dated March 17, 2005 (the "CO&A") relating to the former Bishop Tube HSCA site located approximately a quarter of a mile south of U.S. Route 30, East Whiteland Township, Chester County, Pennsylvania, and consisting of land approximately 13.7 acres in size, and identified as Chester County Tax Parcel Number UPI 42-04-0321.020 (the "Site");

WHEREAS, under the CO&A, in exchange for, inter alia, Developer's commitment to remediate unsaturated soils at the Site in order to demonstrate attainment with one or a combination of remediation standards for soils under the Pennsylvania Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 to 6026.908 ("Act 2"), the Department has provided Developer with a covenant not to sue pursuant to Section 7 of the CO&A, and contribution protection pursuant to Section 9 of the CO&A;

WHEREAS, the Department desires to address the releases or threatened releases of hazardous substances or contaminants in groundwater at the Site;

WHEREAS, Developer and the Department have been engaged in discussions pursuant to which the Developer would satisfy all of its remedial obligations under the CO&A by (1) purchasing and installing certain portions of a soil vapor extraction/air sparging remedial system (the "AS/SVE System") as further described in the Remediation Design Report prepared by Brownfields Associates, Inc. dated November 20, 2006 (the "Remediation Design Report") and attached hereto as Attachment A, and (2) operating the AS/SVE System until it is deemed "Operational" by the Parties;

WHEREAS, Developer and the Department believe that the installation, implementation and operation of the AS/SVE System will assist in the remediation of hazardous substances in soil and groundwater at the Site;

WHEREAS, Developer and the Department desire to amend the CO&A to, inter alia, modify the Developer's remedial obligations thereunder;

WHEREAS, the Parties hereto believe that by entering into this First Amendment, hazardous substances present in soil and groundwater at the Site will be remediated in a more expeditious fashion, to the benefit of the Commonwealth of Pennsylvania;

NOW, THEREFORE, upon the mutual exchange of the covenants contained herein, the Parties intending to be legally bound, it is hereby ORDERED by the Department and AGREED TO by Developer as follows:

1. Paragraph 3 of the CO&A shall be amended and restated as follows:

**"WORK TO BE PERFORMED:** In exchange for the mutual benefits conferred by the Parties under this CO&A, and as compensation for response costs incurred and to be incurred by the Parties in connection with the Site, the Parties hereby agree to the following:

(a) System Installation.

(1) Developer agrees to perform the tasks identified as the responsibility of Developer on the Task Allocation Memo attached hereto as Attachment B and incorporated herein by reference, in accordance with the deadlines contained therein, at no cost, expense, or liability to the Department.

(2) The Department agrees to perform the tasks identified as the responsibility of the Department on the Task Allocation Memo attached hereto as Attachment B, in accordance with the deadlines contained therein, at no cost, expense, or liability to Developer.

(3) During performance of any tasks by either Party pursuant to the Task Allocation Memo, an agent or representative of the non-performing Party shall be present as an "Oversight Party" to observe the performance of work relating to the task, and upon completion of such task, the agent or representative of the Oversight Party shall: (i) when the Oversight Party is Developer, provide a Professional Engineer's Certification in writing that the task was performed correctly and as specified in the Developer's Remediation Design Report; and (ii) when the Oversight Party is the Department, provide written certification that the task was performed correctly, and as specified in the Developer's Remediation Design Report.

(b) System Startup. After completion by the Parties of the tasks identified on the Task Allocation Memo, Developer shall commence, and be solely responsible for the start up of, the AS/SVE System, which start up period shall last for thirty (30) days ("System Start Up"). Developer shall perform System Start

Up at no cost, expense, or liability to the Department, although the Department may have an agent or representative present to monitor System Start Up, with the cost of such monitoring to be the sole liability and responsibility of the Department.

(c) System Operation/Performance Standards.

(1) After completion of the System Start Up, Developer shall operate the AS/SVE System for a period of sixty (60) days (the "First Operation Period") and provide training to Department-specified operators, with each Party bearing their respective costs and expenses. The AS/SVE System shall be deemed "Operational" if (a) the AS/SVE System meets the specifications for system design flow rate, vacuum, and pressure, as identified in the Remedial System Performance Criteria, attached hereto as Attachment C, which are incorporated herein by reference, on at least fifty-four (54) days of the First Operation Period and (b) the AS/ SVE System removes, on average during the First Operation Period, ten (10) pounds of volatile organic compounds ("VOCs") per day; provided that, if a Force Majeure event occurs during the First Operation Period that directly prevents the AS/SVE System from meeting the system design flow rate, vacuum, and pressure specifications on one or more days, the First Operation Period shall be extended by the same number of days as the Force Majeure event. In the event the AS/SVE System is not deemed Operational after the First Operation Period, Developer and the Department shall operate the AS/SVE System for an additional

sixty (60) days (the "Second Operation Period), after which the AS/SVE System would be deemed Operational if (a) the AS/SVE System meets the specifications for system design flow rate, vacuum, and pressure, as identified in the Remedial System Performance Criteria on at least fifty-four (54) days of the Second Operation Period and (b) the AS/ SVE System removes, on average during the Second Operation Period, ten (10) pounds of volatile organic compounds ("VOCs") per day; provided that, if a Force Majeure event occurs during the Second Operation Period that directly prevents the AS/SVE System from meeting the system design flow rate, vacuum, and pressure specifications on one or more days, the Second Operation Period shall be extended by the same number of days as the Force Majeure event. In the event the AS/SVE System is not deemed Operational at the end of the Second Operation Period, the Parties agree to meet to discuss identifying alternative AS/SVE System performance standards, with the objective of identifying a strategy for concluding that the AS/SVE System is Operational.

(2) Completion of Developer's Remedial Obligations. Upon a determination that the AS/SVE System is Operational in accordance with Paragraph 3(c) above, except as otherwise specified herein, Developer shall have no further remedial obligations to the Department relating to the Site pursuant to the CO&A, and the Department shall be solely responsible, with no cost or liability to Developer, to operate the

AS/SVE System at the Site, with the objective of demonstrating attainment with one or a combination of remediation standards pursuant to Act 2 for unsaturated soils at the Site.

(3) AS System Credit. If the air sparging system portion of the AS/SVE System to be located in the Building 8 Vapor Degreaser area of concern (the "AS System") is determined to be "Inoperable," as defined below, notwithstanding the Task Allocation Memo, Developer agrees to pay for the six (6) months of utility bills associated with the AS/SVE System immediately following the Inoperable determination. The AS System will be deemed Inoperable if, during the First Operation Period, or if necessary, the Second Operation Period, the AS System does not: (a) meet the specifications for system design flow rate, vacuum, and pressure, as identified in the Remedial System Performance Criteria on at least fifty-four (54) of sixty (60) days; and (b) recover, on average, ten (10) pounds of volatile organic compounds ("VOCs") per day.

(4) Future Remedial Activities. The Department agrees to operate the AS/SVE System at the Site, and to expeditiously perform (or require responsible parties other than Developer to perform) other necessary remedial actions at the Site in order to demonstrate attainment with one or a combination of remediation standards under Act 2 for soils and groundwater at the Site that are consistent with Developer's intended redevelopment activities. If, upon completion of

AS/SVE system operation, the Department deems it necessary to implement engineering and/or institutional controls in the vicinity of the Drum Storage Area, as identified on Attachment D, to meet an Act 2 standard, Developer will be responsible for implementation of such controls; provided that, Developer shall only be financially responsible for implementing engineering controls in the Drum Storage Area, consisting of Site capping through a combination of asphalt paving, building foundations, and/or landscaped areas; provided further that, such engineering and institutional controls shall not unreasonably interfere with Developer's intended future redevelopment or reuse of the Site. Notwithstanding anything to the contrary contained herein, Developer and subsequent Site owners shall be solely responsible for evaluating, and implementing any necessary engineering and institutional controls, to ensure that vapor intrusion into Site buildings will not pose an unacceptable level of risk to current or future Site occupants.

2. The Developer's address under Paragraph 12 of the CO&A shall be amended and restated as follows:

"Constitution Drive Partners, L.P.  
2701 Renaissance Boulevard, 4<sup>th</sup> Floor  
King of Prussia, PA 19406  
Attention: Kevin Silverang, President, Constitution Drive  
Acquisition Corporation, General Partner of Constitution Drive  
Partners, L.P."

3. A new Paragraph 27 of the CO&A shall be added as follows:

"27. **Force Majeure.**



- a. In the event that Developer is prevented from complying in a timely manner with any time limit imposed in this CO&A solely because of a strike, fire, flood, act of God, or other circumstances beyond Developer's control and which Developer, by exercise of all reasonable diligence, is unable to prevent, then Developer may petition the Department for an extension of time. An increase in the cost of performing the obligations set forth in this Agreement shall not constitute circumstances beyond Developer's control. Developer's economic inability to comply with any of the obligations of this Agreement shall not be grounds for any extension of time.
- b. Developer shall only be entitled to the benefits of this paragraph if it notifies the Department within five (5) working days by telephone and within ten (10) working days in writing of the date Developer becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by Developer to mitigate the effects of the event and to

minimize the length of the delay. The initial written submission may be supplemented within 10 working days of its submission. Developer's failure to comply with the requirements of this paragraph specifically and in a timely fashion may render this paragraph null and of no effect as to the particular incident involved, as determined in the Department's sole discretion.

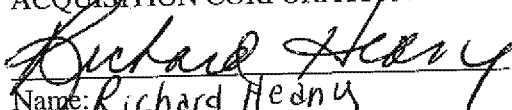
- c. The Department will decide whether to grant all or part of the extension requested on the basis of all documentation submitted by Developer and other information available to the Department. In any subsequent litigation, Developer shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information then available to it.
4. This Amendment shall modify and is made a part of the CO&A. Otherwise, except as amended hereby, the CO&A shall remain unmodified and in full force and effect.
5. This Amendment may be executed in counterparts, each of which counterparts shall constitute an original, but which counterparts together shall constitute the same Amendment. The delivery by any Party hereto of a telecopy or facsimile signature shall have the same legally binding effect as the delivery of an original signature.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their duly authorized representatives. The undersigned representative of the Buyer


certifies under penalty of law, as provided by 18 Pa. C.S. Section 4904, that he is authorized to execute this Amendment on behalf of the Developer; that the Developer consents to the entry of this Amendment as a final Order of the Department; and that the Developer hereby knowingly waives any rights to appeal this Amendment and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 1988-94, 35 P.S. Sect. 7514; the Administrative Agency Law, 2 Pa. C.S. Sect. 103(a) and Chapters 5A and 7A thereof; or any other provision of law. (Signature by attorney for Buyer certifies only that the agreement has been signed after consulting with counsel.)

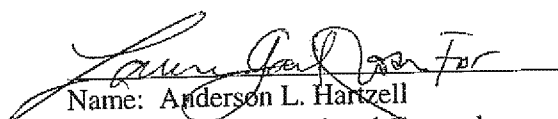
FOR THE BUYER:

CONSTITUTION DRIVE PARTNERS, L.P.  
By its General Partner  
CONSTITUTION DRIVE  
ACQUISITION CORPORATION

  
Name: Richard Heany  
Title: President

FOR THE COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

  
Name: Stephan Sinding  
Title: Environmental Program Manager  
Environmental Cleanup Program

  
Name: Anderson L. Hartzell  
Title: Assistant Regional Counsel

COMMONWEALTH OF PENNSYLVANIA :

:

SS.

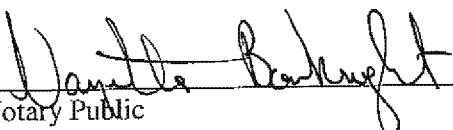
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COUNTY OF (COUNTY)

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On this 22<sup>nd</sup> day of January, 2007, before me, a Notary Public, the undersigned officer personally appeared, Stephan Sinding, who acknowledged himself to be the Environmental Cleanup Program Manager for the Southeast Regional Office of the Pennsylvania Department of Environmental Protection, and that he as such Manager, being authorized to do so, executed the Consent Order and Agreement for the purpose therein contained by signing his name as Cleanup Program Manager.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

  
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Notary Public

